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SUPREME COURT, U.S.

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In the  
Supreme Court of the United States  
October Term, 1957

No. 1038

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THE UNITED STATES,

Petitioner

v.

HOWARD A. McNINCH, D/B/A THE HOME COM-  
FORT CO., ROSALIE McNINCH AND GARIS P.  
ZEIGLER; FREDERICK L. TOEPELMAN; AND  
CATO BROS., INC., WILFRED R. CATO, WILLIAM  
R. CATO, AND MAGIE L. DUNN (NEE: MAGIE  
L. STONE),

Respondents

Petition for a Writ of Certiorari to The United States  
Court of Appeals for the Fourth Circuit

BRIEF FOR CATO BROS., INC.,  
ET AL., IN OPPOSITION

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June, 1957

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THE UNITED STATES,

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HOWARD A. McNINCH; D/B/A THE HOME COMFORT CO., ROSALIE McNINCH AND GARIS P. ZEIGLER; FREDERICK L. TOEPLEMAN; AND CATO BROS., INC., WILFRED R. CATO, WILLIAM R. CATO, AND MAGIE L. DUNN (NEE MAGIE L. STONE).

*Respondents*

**Petition for a Writ of Certiorari to The United States  
Court of Appeals for the Fourth Circuit**

**BRIEF FOR CATO BROS., INC.,  
ET AL., IN 'OPPOSITION'**

**QUESTION PRESENTED**

For purpose of civil suit under the False Claims Act, do the criminal provisions of the Act, as enacted in 1863 and incorporated by the civil provisions of the Act in 1878, prohibit a false claim against Commodity Credit Corporation, a wholly owned government corporation organized in 1948?

**STATEMENT**

Initially, it should be called to the Court's attention that the petition presented by the Solicitor General is, or should

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be, a petition for writs of certiorari in three separate cases arising from decisions in three districts. In these circumstances, of course, this Court may grant or deny such a writ in any of the three cases. Concerning the *McNinch* case, this Court has recently denied certiorari in two cases expressly holding that requests for guarantees of Federal Housing Administration improvement loans were not claims within the meaning of the False Claims Act. See *United States v. Tieger*, 234 F. 2d 589 (3d Cir.), cert. denied, 352 U. S. 941 (1956); *United States v. Cochran*, 235 F. 2d 131 (5th Cir.), cert. denied, 352 U. S. 941 (1956). This alone is grounds for denying the petition in the *McNinch* case, even if this Court feels that a claim against the Federal Housing Administration may be a claim against the Government within the meaning of the False Claims Act.

For purposes of ruling on the petition in the *Cato* case, the only true statement of facts is to be found in the Findings of Fact of the District Court (R. 154). The pertinent portions of such findings are set out hereinbelow:

26. The Commodity Credit Corporation is a body corporate whose entire capital stock is subscribed by the United States of America, and it is an agency and instrumentality of the United States.

27. On August 3, 1948, the Commodity Credit Corporation, and the defendant, Cato Bros., Incorporated, entered into a Lending Agency Agreement, under which the defendant, Cato Bros., Incorporated, was authorized to make loans to producers of 1948 crop cotton in accordance with the provisions of the said agreement.

28. During the year 1948, the defendants, Cato Bros., Incorporated, Wilfred R. Cato, William R. Cato, and Magie L. Dunn (nee Stone), did submit to the Commodity Credit Corporation fifty-five (55) letters, transmitting a total of One Thousand One Hundred

Seventy-Six (1,176) notes representing loans made pursuant to the Lending Agency Agreement.

"9. The defendants, Cato Bros., Incorporated, Wilfred R. Cato, William R. Cato and Magie L. Dunn (Nee: Stone), transmitted to the Commodity Credit Corporation in thirty (30) of the aforementioned letters of transmittal a total of Seven Hundred Forty-eight (748) notes, in each of which letters there was at least one note covering cotton not actually produced by the person who signed the note as producer, and thus made and caused to be presented for payment to persons in the civil service of the United States, thirty (30) claims upon the Commodity Credit Corporation knowing the said claims to be false."

It should be noted here that few if any of the matters set forth on pages 4 through 5 of the petition were found to be facts by the District Court in the *Cato* case.

### STATUTES INVOLVED

The matter quoted on page 3 of the petition is not the False Claims Act nor is it a statute involved in this case. Counsel for petitioner merely has copied Section 231 of Title 31 of the United States Code which, as pointed out in *United States ex rel Kessler v. Mercur Corporation*, 83 F. 2d 178, 180 (2d Cir.), cert. denied, 299 U. S. 576 (1936), is not a true statement of the law.

In reality, the so-called False Claims Act is composed of two statutes, Sections 3490 and 5438 (R.S. 1878). The first of these is a civil statute, Section 3490 of the Revised Statutes of 1878, under which this suit was brought; the second is a criminal statute, Section 5438 of the Revised Statutes of 1878, which was adopted in 1863 and is in part incorporated by reference in Section 3490. These two statutes have never been integrated, and this factor is very important to a proper consideration of the petition. The

third relevant statute is Section 35 of the Criminal Code as amended in 1918, which is the successor to Section 5438 of the Revised Statutes of 1878. The pertinent parts of these statutes are set forth below:

Section 3490 of the Revised Statutes of 1878, 12 Stat. 696, 698:

"Sec. 3490 — Any person not in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States, who shall do or commit any of the acts prohibited by any of the provisions of section fifty-four hundred and thirty eight, Title "CRIMES", shall forfeit and pay to the United States the sum of two thousand dollars, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit."

Section 5438 of the Revised Statutes of 1878, 12 Stat. 696, 698:

"Sec. 5438 — Every person who makes or causes to be made, or presents or causes to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval services of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, . . . shall be imprisoned at hard labor for not less than one nor more than five years, or fined not less than one thousand nor more than five thousand dollars."

Section 35 of the Criminal Code, as amended October 23, 1918, 40 Stat. 1015, the italicized words being added by the amendment:

"Section 35 — Whoever shall make or cause to be made or present or cause to be presented, for payment or approval; to or by any person or officer in the civil, military, or naval services of the United States, or any department thereof, *or any corporation in which the United States of America is a stockholder*, any claim upon or against the Government of the United States, or any department or officer thereof, *or any corporation in which the United States of America is a stockholder*, knowing such claim to be false, fictitious, or fraudulent . . . shall be fined not more than \$10,000.00, or imprisoned not more than ten years or both. . . ."

As will be noted, the last quoted statute contains a reference to claims against government corporations. This reference did not appear until the amendment of 1918.

### **REASONS FOR DENYING THE WRIT**

The decision of the court below is plainly correct.

Respondents were sued under a civil statute enacted in 1878 incorporating certain provisions of a criminal statute enacted in 1863. The pertinent incorporated part of the criminal statute, Section 5438, penalized any " . . . claim upon or against the Government of the United States, or any department or officer thereof. . . ." No mention was made of a claim against a government corporation. This Court already has held specifically that identical language when used before 1884 did not embrace a government corporation. In *Pierce v. United States*, 314 U. S. 306 (1941), this Court held that a person who pretended to be an employee of TVA, a wholly owned government corporation and an agency and instrumentality of the United States, could not be prosecuted under a statute enacted in 1884 making it a crime fraudulently to ". . . pretend to be an officer or employee acting under . . . the authority of the

*United States or any department, or any officer, of the government thereof.* . . . (Emphasis added)

Mr. Justice Reed stated for this Court at pages 310 through 311 of the opinion as follows:

"The statute in effect at the time of the commission of the alleged offenses did not speak of pretenses of acting under authority of corporations owned or controlled by the United States. It was passed in 1884 before the United States owned or controlled corporations operating hotels, boat lines or generating plants. The amendments, subsequent to the occasions fixed by the indictment, extended its scope first to the Home Owners Loan Corporation (citing authority), and later to all corporations owned or controlled by the United States, 52 Stat. at L. 82, Chap. 37. These legislative extensions of the scope of the act were in accord with the growing importance of the administrative corporation, but a comparable judicial enlargement of a criminal act by interpretation is at war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness."

As pointed out in this Court's opinion in *United States ex rel Marcus v. Hess*, 317 U. S. 537, 542 (1942), the Court is concerned with the construction of a criminal statute here, since the provisions of Section 5438 incorporated by Section 3490 must be construed uniformly in either a civil suit under the latter section, as here, or in a criminal prosecution under the former section.

In a dictum appearing at page 312 of the opinion in *Pierce*, this Court recognized that Section 5438 (referred to in the opinion as Section 35 of the Criminal Code) was in like manner extended to cover government corporations by the amendment of 1918. As always conceded by the petitioner, and soundly supported by opinions of this Court,

the 1918 extension of Section 5438 to cover government corporations did not in like manner extend the scope of Section 3490, the civil statute under which this suit was brought, since amendment of the incorporated statute could not affect the scope of the incorporating statute. See *Kendall v. United States*, 12 Pet. (37 U. S.) 524 (1830); *In re Heath*, 144 U. S. 92 (1892); *Hassett v. Weleh*, 303 U. S. 303 (1937); *United States ex rel Kessler v. Mercur Corporation*, 83 F. 2d 178, (2d Cir.), cert. denied, 299 U. S. 576 (1936). The incorporating statute, Section 3490, has never been amended since 1878 when it first incorporated part of Section 5438.

On page 12 of the petition, the Solicitor General has referred to three cases in which it is contended government corporations were held to be identical with the Government of the United States. Without going into particulars here, since all such cases turn upon the particular facts presented, we now cite a number of cases in which this Court has held that a government corporation is an entity, separate and distinct from the United States and is to be treated as such, although such a corporation may be financed, controlled and managed by the United States. *United States v. Strang*, 254 U. S. 491, 493 (1920); *Sloan Shipyards Corp. et al v. United States Shipping Board E. F. Corp.*, 258 U. S. 549 (1921); *United States ex rel Skinner Eddy Corp. v. McCarl*, 275 U. S. 1 (1927); *United States Shipping Board E. F. Corp. v. Hartwood*, 281 U. S. 522 (1929); *The Bank of the United States v. The Planters Bank of Georgia*, 9 Wheat. 904 (1824); *The Lake Monroe*, 250 U. S. 246 (1918); *Clallam County v. United States*, 263 U. S. 341 (1923).

In addition to this Court's controlling decision in the *Pierce* case, *supra*, the extensive and clear legislative history of Sections 3490 and 5438 reveals that a government corporation was not included within their scope in 1878.

Not until the 1918 amendment of Section 5438 (then appearing as Section 35 of the Criminal Code) did this section specifically include an offense against government corporations. By this amendment such an inclusion was made. See 40 Stat. 1015, and page 5, *supra*. Upon adoption of the 1918 amendment, the proponents of the amendment in Congress stated that it served to re-enact the provisions of Section 35 of the Criminal Code (formerly Section 5438):

"... so that it will include all the offenses heretofore contained therein and an offense against any corporation in which the United States of America is a stockholder." . . . The only amendments to the existing law are the extension of the penalty of this act to false and fraudulent claims that are presented against corporations in which the United States is a stockholder. . . . That as I recall it was all there was to this bill as it came from the Senate, and to it was subsequently attached the rest of § 35 as amended to extend the law to false and fraudulent claims made against a corporation in which the United States is a stockholder." H. R. Rep. 668, 65th Cong. 2d Sess. (1918); 56 Cong. Rec. 11,118-11,119 (1918).

Congress declared it was extending the scope of the statute, and in four of its decisions this Court has specifically declared that the amendment of 1918 extended the scope of Sect. 5438 to cover government corporations and that even as extended the section covered only those corporations so controlled and managed by the Government as to be agencies and instrumentalities of the Government. See *United States v. Bowman*, 260 U. S. 94 (1922); *United States v. Walter*, 263 U. S. 15, 17 (1923); *United States v. Strang*, 254 U. S. 491, 493-494 (1920); *United States v. Bramblett*, 348 U. S. 503, 506 (1955) (footnote).

It is authoritatively settled by opinions of this Court, and

conceded by petitioner, that liability attaches under Section 3490 only upon commission of acts prohibited by Section 5438, as that section read and was understood in 1878. See *United States ex rel Marcus v. Hess*, 317 U. S. 537 (1942); *United States ex rel Brensilber v. Bausch and Lomb Optical Company*, 131 F. 2d 545 (2d Cir. 1942), affirmed, 320 U. S. 711 (1943); *United States v. Rohleder*, 157 F. 2d 126 (3d Cir. 1946).

Respondents think it abundantly clear from this Court's decision in the *Pierce* case, *supra*, from the legislative history of the two sections involved and from this Court's decisions based on such legislative history that not until 1918 did Section 5438 of the Revised Statutes of 1878 proscribe a claim against a government corporation. Since this is clear, no liability could attach under Section 3490 which incorporates only the provisions of Section 5438 as they stood in 1878.

Petitioner places great reliance upon this Court's decision in *United States ex rel Marcus v. Hess*, 317 U. S. 537 (1942). Petitioner contends this case is controlling, since it contends that government funds are expended and that is all that is necessary. It is apparent, however, that whether or not government funds are expended as we view the case in 1957 is immaterial, since in 1878 Section 5438 did not encompass a claim against a government corporation. The *Hess* case merely sets down a rule of construction to be used where there is ambiguity or uncertainty as to the application of the statute. In this case, there is no uncertainty. Congress has said that this statute did not cover a government corporation until 1918, and this Court has recognized this in the cases cited above. In these circumstances, a rule of construction is not necessary, since the meaning and scope of the statute are clear. As pointed out in the decisions cited

on page 7, *supra*, a government corporation is no mere bookkeeping device to be ignored by Congress or the courts.

Petitioner has pointed out that numerous other cases are pending involving this question, in which some \$4,000,000.00 in damages are claimed. The decision of this case will have little, if any, bearing upon such claims for damages, since the Government will always be free to bring a common-law action for such damages without the aid of the present statute. If respondents position is sustained before this Court, and the petition is denied, the remedy for the Government if it wishes to recover penalties in the future is a simple one. All that is needed is appropriate action by Congress.

Concerning the conflict in circuits which has arisen, respondents respectfully submit that certiorari should be denied in this case and, upon proper application, granted in the *Rainwater* case and that decision reversed.

### CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied in the *Cato* case.

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